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Supreme Court, U.S.
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No. 96-1204

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

CARL PEASE,
Petitioner

v.

YELLOWSTONE COUNTY, a political subdivision of the State of Montana
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

Cases:

A-1 Contractors v. Strate,
76 F.3d 930 (8th Cir. 1996) (en banc),
cert. granted, 117 S.Ct. 37
(1996)(No.96-1872) 1, 2

Holly Farms v. *National Labor Relations Board*,
516 U.S. ___, 116 S.Ct. 1396 (1996) 2

Iowa Mutual Insurance Co. v. LaPlante,
480 U.S. 10 (1987) 4

Lewis County v. Allen,
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Matsushita Elec. Industrial Co. v. *Epstein*,
516 U. S. __, 116 S.Ct. 873 (1996) 2

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982) 5

Montana v. Gilham, 932 F.Supp. 1215
(D. Mont 1996), *appeal docketed*
(9th Cir. July 18, 1996)(No. 96-35766) 3

National Farmers Union v. Crow Tribe,
471 U.S. 845 at 857 (1985) 4, 5

Rules:

Rule 10, Rules of the Supreme Court 1

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REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

I. *A-1 CONTRACTORS* DOES AFFECT THIS MATTER.

Yellowstone County advanced two grounds for denying certiorari. First it argued that if *Strate v. A-1 Contractors,* No. 95-1872, *cert. granted*, 117 S.Ct. 37 (1996), is affirmed, there would be no reason to grant certiorari. This would be true if this Court says nothing new in its decision. However, Pease believes this Court grants certiorari to address important issues. Rule 10, Rules of the Supreme Court. It is likely that this court will shed significant light on the extent of civil jurisdiction of tribal courts over non-Indians. *A-1*

Contractors will have an effect on what jurisdiction the Crow Tribe can assert over non-Indians. What effect it will have on the Ninth Circuit's decision, if any, is appropriately first addressed by the Ninth Circuit, and at its discretion, the district court.

II. THE INDEPENDENT GROUND THEORY DOES NOT JUSTIFY DENYING CERTIORARI.

A. SOVEREIGN IMMUNITY WAS NOT ADDRESSED BELOW.

Yellowstone County argues that certiorari should be denied because the judgment could be affirmed on an independent ground, the county's sovereign immunity. Neither the district court nor the Ninth Circuit addressed the sovereign immunity issue. The Ninth Circuit specifically did not rule on the issue. Ninth Circuit opinion at n.8, App. 19a. The district court never mentioned the issue in its decision. App. 21a-27a. This Court generally does "not address arguments that were not the basis for the decision below," *Matsushita Elec. Industrial Co.* v. *Epstein*, 516 U. S. __, 116 S.Ct. 880, at n. 5 (1996); *Holly Farms* v. *National Labor Relations Board*, 516 U.S. __, 116 S.Ct. 1396, 1402 at n. 7 (1996).

While the County makes an extensive argument on the merits of this independent ground, the only authority cited where the argument was adopted was a district court case that is pending on appeal. *Montana v. Gilham*, 932 F.Supp 1215 (D. Mont 1996), *appeal docketed* (9th Cir. July 18, 1996)(No. 96-35766). *See,* Brief in Opposition at 6. Rather

than relying a case in which judgment on appeal has yet to be rendered, the wiser course would be to grant the petition for certiorari in this case and remand for consideration of the sovereign immunity issue.

B. THE "INDEPENDENT GROUND" WAS NOT TIMELY RAISED.

It should also be noted that the sovereign immunity issue was never raised in the tribal court. Denying certiorari on the basis of an argument that was never presented to the tribal court would allow the county to bypass the requirement that jurisdictional defenses first be presented to the tribal court before bringing a collateral attack in the federal courts. Before an action can be maintained in the federal courts to challenge the jurisdiction of a tribal court, the party challenging the tribe's jurisdiction must give the tribal court a "full opportunity" to pass upon any jurisdictional defenses[1]. *National Farmers Union v. Crow Tribe*, 471 U.S. 845 at 857 (1985); *Iowa Mutual Insurance Co. v. LaPlante*, 487 U.S. 9 at 16 (1987). While the County may have exhausted tribal remedies, it failed to raise in the tribal court the defense that it now seeks to use a basis to deny certiorari.

Giving the tribal court a full opportunity to address an issue is more than a mere ministerial act; it is important to federal courts. "[T]he orderly administration of justice in the federal

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[1]Pease does not concede that sovereign immunity is jurisdictional in nature as opposed to an affirmative defense.

courts will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *National Farmers Union*, 471 U.S. at 856. Failure to raise the sovereign immunity argument in the tribal court did not give the tribal court a "full opportunity" to address the issue. Certiorari should not be denied on an independent ground never addressed by the courts below and not raised in the court of first impression.

C. THE COUNTY DOES NOT ENJOY SOVEREIGN IMMUNITY.

There does not appear to be definitive authority on a county's sovereign immunity in tribal court[2], but the clear implication of other authority indicates that local governments are not immune. The alleged tortfeasor in the underlying tribal court action in *National Farmers Union* was the Lodge Grass school district, a political subdivision of the state. If sovereign immunity were a clear jurisdictional prohibition against a tribe asserting jurisdiction over a political subdivision of a state, exhaustion of the tribal remedies would not have been necessary. *National Farmers Union* at n. 21. Additionally, *LaPlante* and *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982), indicate that tribes retain jurisdiction unless Congress divests them of such jurisdiction. The implication from reading these cases together is that tribes

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[2]The issue may be decided for the Ninth Circuit in *Lewis County v. Allen*, No. 94-35979 (9th Cir.), appeal pending.

have jurisdiction over local governmental entities unless or until Congress says otherwise. This Court should conclude that the issue of sovereign immunity needs to be developed in the courts below before this court uses it as an independent basis to deny certiorari.

CONCLUSION

The petition should be granted, the decision below vacated, and the matter remanded for further consideration consistent with *A-1 Contractors.*

Respectfully Submitted,

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